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reasonable mind from the testimony of the senses." (Emphasis added.) In *LeFavre v. State*,²⁸ the Maryland court stated "... an offense is committed in his presence or view if, through his senses he had knowledge of facts or circumstances sufficient to justify a sincere belief that accused is committing the misdemeanor in his presence." The New York court stated in *People v. Esposito*,²⁹ "If a police officer is in bodily reach of a person then and there engaged in the commission of a misdemeanor, and perceiving indications of the commission of the offense sufficient to induce reasonable belief of the fact, acting in good faith, intending performance of duty, proceeds to arrest such person, the arrest is lawful as for the commission of a crime in the officer's presence." This seems to be what the legislature intended by adding the clause "reasonable grounds to believe that it is committed in his presence." Nor does it seem that the legislature intended our statute to be broader than these interpretations.

Thus the test would seem to be: Has the officer observed enough facts and circumstances through his senses or personal observation as should reasonably cause him to believe that he is presently observing the commission of the crime.

ROBERT L. GRUBB, JR.

Eminent Domain in North Carolina—A Case Study

Eminent domain, a term attributable to the famous seventeenth century jurist, Hugo Grotius, means the right of the state or of a person acting for the state to use, alienate, or destroy property of a citizen for the ends of public utility.¹ This right, also called the power of condemnation, belongs to every independent government as an incident of its sovereignty and needs no constitutional recognition.² The right is founded upon the fact that such property is to be used only for the benefit of the general public,³ and it is allowed only so far as it is necessary for the proper construction and use of the improvement for which it is taken.⁴ The policy underlying the authority to condemn is to prevent an owner aware of the necessity of the taker from making the most of such necessity and demanding an outrageously high price.⁵ With the upsurge in the development of super highways and hydroelectric dams and the redevelopment of urban areas, eminent domain is an area of the law that is gaining in importance in this state and elsewhere. Thus it seems worth-

²⁸ 208 Md. 52, 56, 116 A. 2d 368, 369 (1955), case reversed on lack of evidence in 118 A. 2d 639 (1955).

²⁹ 118 Misc. 867, 194 N. Y. Supp. 326, 332 (Sp. Sess. 1922).

¹ *Wissler v. Yadkin River Power Co.*, 158 N. C. 465, 74 S. E. 2d 460 (1912).

² *Jeffress v. Town of Greenville*, 154 N. C. 490, 70 S. E. 2d 919 (1911).

³ *Sparrow v. Dixie Leaf Tobacco Co.*, 232 N. C. 589, 61 S. E. 2d 700 (1950).

⁴ *Spencer v. Willis*, 179 N. C. 175, 178, 102 S. E. 275, 277 (1920) (dictum).

⁵ *Nantahala Power & Light Co. v. Moss*, 220 N. C. 200, 17 S. E. 2d 10 (1941).

while at this time to appraise the North Carolina case law on this subject.

Who can exercise the power of condemnation:

Since the power of condemnation is a sovereign power it can be acquired only by legislative grant.⁶ Being in derogation of the ordinary rights of private ownership the statutes conferring condemnation powers are strictly construed.⁷ Unless orderly procedure meeting the requirements of due process is specified, the grant of condemnation power is invalid. This procedure may either be expressed in the statute granting the power or in the general law.⁸ Yet within the constitutional limitation that the power be exercised for a public purpose,⁹ the will of the legislature is supreme; this means that delegating the power rests in the sound discretion of the legislature, even to the extent of discriminating among delegates.¹⁰ Thus, an electric power company which is a riparian owner does not have condemnation powers for that reason alone,¹¹ and even a municipal corporation has no such power unless authorized by charter or general law.¹² If the power of condemnation is not expressly or clearly implied in the statute or if there is no provision for compensation included, it is presumed that the legislature intended that the property be obtained by contract.¹³

Extent of the power of condemnation:

Since condemnation is a forced purchase, it is considered that the owner should first have the opportunity to sell voluntarily. Therefore, the condemnor must attempt to purchase the land before it has the right to resort to condemnation.¹⁴ This prerequisite attempt is deemed to have been made where the owner refuses to sell except at an excessive price, or where the owner cannot convey because of some disability.¹⁵ Unless excluded by statute, any kind of private property, real or personal may be condemned.¹⁶

⁶ *Commissioners v. Bonner*, 153 N. C. 66, 68 S. E. 970 (1910).

⁷ *Sechriest v. Thomasville*, 202 N. C. 108, 162 S. E. 212 (1932); *Board of Education v. Forrest*, 193 N. C. 519, 137 S. E. 431 (1927); *Mason v. Durham County*, 175 N. C. 638, 96 S. E. 110 (1918); *Johnson City So. Ry. v. South & W. R. R.*, 148 N. C. 59, 61 S. E. 683 (1908).

⁸ See *Eppley v. Bryson City*, 157 N. C. 487, 73 S. E. 197 (1911).

⁹ *Cozard v. Hardwood Co.*, 139 N. C. 283, 51 S. E. 932 (1905).

¹⁰ *Carolina-Tennessee Power Co. v. Hiwassee River Power Co.*, 175 N. C. 668, 96 S. E. 99 (1918).

¹¹ *Ibid.*

¹² *Lloyd v. Town of Venable*, 168 N. C. 531, 84 S. E. 855 (1915).

¹³ *Commissioners v. Bonner*, 153 N. C. 66, 68 S. E. 970 (1910). An instance where condemnation power was implied is found in *Mountain Retreat Ass'n v. Mount Mitchell Development Co.*, 183 N. C. 43, 110 S. E. 524 (1922) where the corporation was given broad powers to maintain turnpikes in the state.

¹⁴ *Greensboro v. Garrison*, 190 N. C. 577, 130 S. E. 203 (1925); *Plott v. Western N. C. R. R.*, 65 N. C. 74 (1871).

¹⁵ See *Western Carolina Power Co. v. Moses*, 191 N. C. 744, 133 S. E. 5 (1926).

¹⁶ *United States v. Lynah*, 188 U. S. 445 (1903); *Parks v. Board of County*

The power of condemnation is a continuing power, generally to be exercised by the delegatee of the legislature when and to the extent that public good may require, and the power is not exhausted by a single exercise.¹⁷ Yet if an enabling statute does limit a condemnor to take but a certain number of acres of land, the power is not exhausted until the maximum acreage is acquired by virtue of condemnation;¹⁸ land acquired by purchase is disregarded in applying the statutory limitation.¹⁹ The condemnor has no right to condemn only the soil and to disregard the buildings, for the property must be taken as it is or be rejected altogether. It cannot move or compel the owner to move a building from the land to be condemned onto adjacent property of the owner,²⁰ for the value of the building must be taken into account. However, the legislature has power to authorize payment for the land without the building plus payment for the cost of removing the building to other land and restoring it.²¹

The time, necessity, expediency, manner and method of condemnation is within the absolute discretion of the condemnor in the absence of oppression, and the courts have no jurisdiction as to whether the taking is expedient or necessary.²² The question of reasonable necessity is in issue only on the owner's allegations showing bad faith or an oppressive abuse of discretion.²³ Even a prior judgment of the superior court that a certain street was not necessary for public purposes will not affect the legislative act authorizing such to be condemned.²⁴ The power of condemnation extends to the taking of the entire property permanently, even though the most familiar example is a taking of a perpetual easement in realty rather than a fee simple.²⁵

The owner's right to just compensation:

The Federal Constitution and all the state constitutions except that of North Carolina now contain express prohibitions against the taking of private property for public use without compensation.²⁶ Though the North Carolina Constitution has no express provision for compensation,

Comm'n'rs, 186 N. C. 490, 120 S. E. 46 (1923); North Carolina & R. & D. R. R. v. Carolina Cent. Ry., 83 N. C. 489 (1880).

¹⁷ Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267 (1912).

¹⁸ Board of Education v. Pegram, 197 N. C. 33, 147 S. E. 622 (1929).

¹⁹ Board of Education v. Forrest, 190 N. C. 753, 130 S. E. 621 (1925); Board of School Trustees v. Hinton, 165 N. C. 12, 80 S. E. 890 (1914).

²⁰ Proctor v. State Highway and Pub. Works Comm'n, 230 N. C. 687, 55 S. E. 2d 479 (1949).

²¹ See Goldsboro v. Holmes, 180 N. C. 99, 104 S. E. 140 (1920).

²² Stratford v. Greensboro, 124 N. C. 127, 32 S. E. 394 (1899).

²³ Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267 (1912).

²⁴ Call v. Town of Wilkesboro, 115 N. C. 337, 20 S. E. 468 (1894).

²⁵ See cases cited in notes 3 and 20 *supra*, and notes 28, 112 and 123 *infra*.

²⁶ JAHR, EMINENT DOMAIN § 36 (1953).

"it is so well settled that private property cannot be taken directly or indirectly, even for public purposes, without compensation, that it seems a work of supererogation even to restate the principle."²⁷ The basis seems to be that when North Carolina and its citizens entered into their compact of ordered liberty and self restraints, the principle, although not stated, was assumed by all to exist. This idea was expressed in the leading case on this subject in 1837 by Chief Justice Ruffin in *Raleigh & Gaston R. R. v. Davis*:²⁸

" . . . If it be not incorporated therein, the omission must be attributed to the belief of the founders of the government, that the legislature would never perpetrate so flagrant an act of oppression, or that it would be tolerated by the people, but be redressed by the next representatives chosen. *There is no doubt that while the legislature and the people of this state expressly restrict the action of the general government on this subject, it must have been supposed by the people that their own local government was in like manner restrained*, or would never act in a manner to make such restraint necessary. There is, however, no clause in that instrument [the constitution] which seems to bear on that point unless it be [the present Article 1, Section 17, of the North Carolina Constitution.]" [Italics added.]

The italicized portion of the above quoted material takes on special significance in view of the fact that North Carolina at first refused to ratify the Federal Constitution because there was not included a Bill of Rights.²⁹ Article 1, Section 17, of the North Carolina Constitution, prohibits the taking of a person's property but by the "law of the land"—the words of Magna Carta; this latter instrument was interpreted to require just compensation from the Sovereign long before this country became independent.³⁰ Although equivocal statements may be found as to the right of just compensation,³¹ the principle has never been denied.³²

²⁷ *Phillips v. Postal Telegraph-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902).

²⁸ 19 N. C. 451, 460 (1837). N. C. CONST. art. 1, § 17: "No person ought to be . . . in any manner deprived of his life, liberty or property but by the law of the land." Another provision which seems to relate to this matter is N. C. CONST. art. 1, § 35: ". . . [E]very person for an injury done him in his lands . . . shall have remedy by due course of law. . . ."

²⁹ LEFLER AND NEWSOME, *NORTH CAROLINA* 268-70 (1954).

³⁰ *Staton v. Norfolk & C. R. R.*, 111 N. C. 278, 16 S. E. 181 (1892); JAHR, *EMINENT DOMAIN* § 1 (1953).

³¹ See *State v. Glen*, 52 N. C. 321, 334 (1859): ". . . [The] legislature may, perhaps, resume the incidental rights [to the nonnavigable river bed] for the public use, without making compensation for them; though we believe it has often given such compensation."

³² See *Yancey v. North Carolina State Highway & Pub. Works Comm'n*, 222 N. C. 106, 22 S. E. 2d 256 (1942).

The court buttresses this position by relying on justice and equity, which is called the basis of the fundamental law.³³

However the North Carolina Constitution be construed, statutes which authorize a taking of private property must provide for compensation in order to be valid;³⁴ it is clear today that the Fourteenth Amendment guarantees the owner just compensation for property taken by the state.³⁵ Whatever the constitutional basis, the strength of the mandate is shown by the fact that this is apparently one situation where the state may be sued without its consent.³⁶ This writer concludes that the principle of just compensation is simply a part of the North Carolina provincial law which it retained upon becoming independent,³⁷ in the same manner as it retained the idea that a petit jury must be composed of twelve members.³⁸

The requisite taking to require compensation:

"The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. The term comprehends not only the thing possessed but also, in strictly legal parlance, means the right of the owner to . . . possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use."³⁹ So, when a physical interference with the thing possessed subverts one of these essential rights, such interference is a "taking" of the owner's property. Not all losses of property are compensable, however, for property may be confiscated by virtue of taxation or restrictions imposed by the police power and may be destroyed in great emergencies—such as in wartime⁴⁰ or times of public calamity⁴¹ without

³³ *Sale v. State Highway and Pub. Works Comm'n*, 242 N. C. 612, 89 S. E. 2d 290 (1955).

³⁴ *Parks v. Board of Comm'rs*, 186 N. C. 490, 120 S. E. 46 (1923); *Bennett v. Winston-Salem Southbound Ry.*, 170 N. C. 389, 87 S. E. 133 (1915); *Commissioners v. Bonner*, 153 N. C. 66, 68 S. E. 970 (1910).

³⁵ *Chicago, B. & Q. R. R. v. Chicago*, 166 U. S. 226 (1896); see *McKinney v. Deneen*, 231 N. C. 540, 58 S. E. 2d 107 (1950) and *Yarborough v. North Carolina Park Comm'n*, 196 N. C. 284, 145 S. E. 563 (1928).

³⁶ *Sale v. State Highway and Pub. Works Comm'n*, 242 N. C. 612, 89 S. E. 2d 290 (1955); *Dalton v. State Highway and Pub. Works Comm'n*, 223 N. C. 406, 27 S. E. 2d 1 (1943); see *Angelle v. State*, 212 La. 1069, 34 So. 2d 321 (1948).

³⁷ This conclusion is contrary to that reached by a writer on the subject in *Note*, 28 N. C. L. Rev. 403, 405 (1950) who contended that the principle is a result of judicial fiat.

³⁸ *State v. Berry*, 190 N. C. 363, 130 S. E. 12 (1925). Here the verdict of guilty rendered by less than twelve jurors was held unconstitutional.

³⁹ *Hildebrand v. Southern Bell Tel. and Tel. Co.*, 219 N. C. 402, 408, 14 S. E. 2d 252, 256 (1941); *Matthews v. Board of Corp. Comm'n's*, 106 Fed. 7 (4th Cir. 1901).

⁴⁰ *United States v. Caltex (Philippines)*, 344 U. S. 149 (1952) rehearing denied 344 U. S. 919 (1953). Here the military authorities destroyed oil and installations belonging to a private corporation to keep the Japanese from getting it upon capturing the island.

⁴¹ *Bowditch v. Boston*, 101 U. S. 16 (1879) (fire); see *New Orleans Pub. Serv. Co. v. New Orleans*, 281 U. S. 682 (1930).

compensation. Taxation is unlike eminent domain in that no specific property is taken; the police power is unlike eminent domain in that the police power fetters the rights of property while eminent domain takes them away. But any direct encroachment on the property creates a right in the owner to compensation.⁴²

Parties entitled to compensation:

Only persons with some sort of ownership interest in the property may receive compensation. The cases indicate that this interest need not be an exclusive one, and that the damages will be given to the extent that each person's interest in the property has in fact been taken.⁴³ Among

⁴² *McKinney v Deneen*, 231 N. C. 540, 58 S. E. 2d 107 (1950); *Hildebrand v. Southern Bell Tel. and Tel. Co.*, 219 N. C. 402, 14 S. E. 2d 252 (1941); *Clinard v. Town of Kernersville*, 215 N. C. 745, 3 S. E. 2d 267 (1939).

Instances where there was held a compensable taking are as follows: *Matthews v. Board of Corp. Comm'nrs*, 106 Fed. 7 (4th Cir. 1901) (utility rates fixed too low); *McLean v. Town of Mooresville*, 237 N. C. 498, 75 S. E. 2d 327 (1953) (sewer line); *Moore v. Clark*, 235 N. C. 364, 70 S. E. 2d 182 (1952) (land taken for public highway); *Myers v. Wilmington-Wrightsville Beach Causeway Co.*, 204 N. C. 260, 117 S. E. 858 (1933) (cost of new bridge built to Government specifications when old bridge ordered destroyed); *Hiatt v. Greensboro*, 201 N. C. 515, 160 S. E. 748 (1931) (street in front of owner's lot changed from through street to dead-end); *Query v. Postal Telegraph-Cable Co.*, 178 N. C. 639, 101 S. E. 390 (1919) (telegraph poles as additional servitude on fee even though land already subject to easement for railroad right of way); *Kirkpatrick v. Piedmont Traction Co.*, 170 N. C. 477, 87 S. E. 232 (1915) (additional servitude on abutting owners caused by commercial railroad in street); *Donnell v. Greensboro*, 164 N. C. 330, 80 S. E. 377 (1913) (continuing pollution of stream by municipality); *Moore v. Carolina Power and Light Co.*, 163 N. C. 300, 79 S. E. 595 (1913) (trees cut down that are not interfering with the use of the street or sidewalk); *Spencer v. Seaboard Air Line Ry.*, 137 N. C. 107, 49 S. E. 96 (1904) (forced sale of railroad stock at assessed value); *State v. New*, 130 N. C. 731, 41 S. E. 1033 (1902) (drainage ditch dug through private land); *Beach v. Wilmington & W. R. R.*, 120 N. C. 498, 26 S. E. 703 (1897) (lands of owner overflowed by backwater from dam); *Cornelius v. Glen*, 52 N. C. 512 (1860) (removal of dam from private stream); *Pipkin v. Wynns*, 13 N. C. 412 (1830) (using owner's river bank for ferry landing although at point of public highway).

Instances where there was not a compensable taking are as follows: *Spaugh v. Winston-Salem*, 234 N. C. 708, 68 S. E. 2d 838 (1952) (city's appropriation of sewage system built by owner who had constructive knowledge of ordinance giving city power to take without payment when incorporating new area); *Hildebrand v. Southern Bell Tel. and Tel. Co.*, 221 N. C. 10, 18 S. E. 2d 827 (1942) (highway commission's assignment of right to maintain telephone line on its easement pursuant to broad powers in condemnation judgment); *Calhoun v. State Highway and Pub. Works Comm'n*, 208 N. C. 424, 181 S. E. 271 (1935) (decreased value of the lot caused by grade change in established street); *Pemberton v. Greensboro*, 208 N. C. 466, 181 S. E. 258 (1935) (owner restrained from discharging sewage in his own stream when it is source of city's water supply); *Hudson v. Town of Morganton*, 205 N. C. 353, 171 S. E. 329 (1933) (owner forced to abandon own land through fear of prosecution for trespassing on "watershed" set up without any physical entry on part of city); *Turner v. North Carolina Pub. Serv. Corp.*, 174 N. C. 522, 93 S. E. 998 (1917) (servitude on adjoining lot owner when street used for street railway); *Crowell v. City of Monroe*, 152 N. C. 399, 67 S. E. 989 (1910) (inconvenience to lot owner by town's closing of part of street under police power); *Rosenthal v. Goldsboro*, 149 N. C. 128, 62 S. E. 905 (1908) (city's removal of owner's shade trees to preserve street sewers); *Pool v. Trexler*, 76 N. C. 297 (1877) (draining "wet lands" across land of another by virtue of police power statute).

⁴³ *Joyner v. Conyers*, 59 N. C. 78 (1860).

those who have been allowed a recovery are: one tenant in common, although the other tenant had already given a grant to the taker;⁴⁴ the developer of a subdivision when its water system was appropriated by the city, even though many of the lots had been sold;⁴⁵ and the purchaser at a foreclosure sale of land from which the mortgagor, without the consent of the mortgagee, had granted a right of way instead of forcing the taker to condemn.⁴⁶ Even a lessee may recover damages when his right of ingress and egress was obstructed by the condemnor building a railroad.⁴⁷ Both the life tenant and the vested remainderman of the land taken may recover,⁴⁸ but the clerk holds the award for contingent remaindermen in trust.⁴⁹ And it would seem that a mere possessor of land might be entitled to compensation.⁵⁰

Condemnation must be for a public use:

Condemnation is not proper unless it is exercised for a public purpose, to be determined by the right of the general public to use or benefit from the use of the property rather than by the extent of the actual use.⁵¹ The question of whether condemnation is for a public use is a judicial one to be decided by the courts.⁵² Condemnation for such things as electric light poles,⁵³ schools,⁵⁴ public highways and railroads⁵⁵ are obviously for public purposes; the court has gone so far as to say that condemnation for a public street is a taking for a public use as a matter of law.⁵⁶ The modern trend seems to allow condemnation for purely aesthetic purposes.⁵⁷ The use may be public although managed by a private corporation, as where a toll road is open to all the public upon payment of a reasonable fee.⁵⁸

⁴⁴ *Hill v. Glendon and Gulf Mining and Mfg. Co.*, 113 N. C. 259, 18 S. E. 171 (1893).

⁴⁵ *Stephens Co. v. Charlotte*, 201 N. C. 258, 159 S. E. 414 (1931).

⁴⁶ *Liverman v. Roanoke & T. R. R.*, 109 N. C. 52, 13 S. E. 734 (1891).

⁴⁷ *South Atlantic Waste Co. v. Raleigh, C. & So. Ry.*, 167 N. C. 340, 83 S. E. 618 (1914).

⁴⁸ *Joyner v. Conyers*, 59 N. C. 78 (1860).

⁴⁹ *Stubbs v. United States*, 21 F. Supp. 1007 (M. D. N. C. 1938); *Miller v. Asheville*, 112 N. C. 769, 16 S. E. 765 (1893).

⁵⁰ See *Pace v. Freeman*, 32 N. C. 103 (1849).

⁵¹ *Cozard v. Hardwood Co.*, 139 N. C. 283, 288, 51 S. E. 932, 934 (1905) (dictum).

⁵² *Cobb v. Atlantic C. L. R. R.*, 172 N. C. 58, 89 S. E. 807 (1916); *Call v. Town of Wilkesboro*, 115 N. C. 337, 20 S. E. 468 (1894). The Federal Rule seems to be that Congress may decide what type of taking is for a public use. *United States ex rel. TVA v. Welch*, 327 U. S. 546 (1945).

⁵³ *Wissler v. Yadkin River Power Co.*, 158 N. C. 465, 74 S. E. 460 (1912).

⁵⁴ *Board of School Trustees v. Hinton*, 165 N. C. 12, 80 S. E. 890 (1914).

⁵⁵ *Raleigh & G. R. R. v. Davis*, 19 N. C. 451 (1837).

⁵⁶ *Jeffress v. Town of Greenville*, 154 N. C. 490, 70 S. E. 919 (1911).

⁵⁷ *Berman v. Parker*, 348 U. S. 26 (1954), noted in Note, 33 N. C. L. REV. 482 (1955) (redevelopment of blighted areas); *Yarborough v. North Carolina Park Comm'n*, 196 N. C. 284, 145 S. E. 563 (1928) (park).

⁵⁸ *Mountain Retreat Ass'n v. Mount Mitchell Development Co.*, 183 N. C. 43, 110 S. E. 524 (1922). Although the legislature cannot authorize the owner of

Change in the public use:

For one taker to be able to condemn the property of one also having the power of condemnation, there ordinarily must be a legislative grant of this particular power in express terms or by necessary implication.⁵⁹ Such a taker must show necessity and must exercise the right with as little interference as it can without a great increase in cost and inconvenience.⁶⁰ The power of the North Carolina State Highway and Public Works Commission to condemn land within a city for highway purposes is an example of this.⁶¹ Without special legislative authority, one taker cannot spoil the plan of another by condemning lands needed by the other who is free from unreasonable delay, bad faith, or abandonment of the condemnation purpose.⁶² There is general language in the cases to the effect that entry for a new and different use is a taking, without regard to the extent of the injury, and such new entry can be made only when the new use is public.⁶³ Thus, it is generally held that the owner should be compensated for takings where additional servitudes which cause additional damages are placed on the land. A telegraph company placing its poles on lands over which a railroad has an easement must pay for this privilege.⁶⁴ Yet a street car company does not have to pay the owner of the fee for tracks laid down the street because this does not materially increase the burden on the land.⁶⁵ In another situation, *Bass v. Roanoke Navigation & Waterpower Co.*⁶⁶ held that the legislature may substitute a new public use not more burdensome to the owners of the fee than the old public use without making additional compensation for a retaking; the court's theory was that the owners were not entitled to claim a forfeiture of the original easement because their possibility of reverter is a contingent claim, defeasible at the will of the state.

standing timber to build a railroad or tramway over the lands of another to remove such timber because this would be a taking for a private use, the statute providing that the timber owner may condemn a right of way for a cartway is valid. *Cozard v. Hardwood Co.*, 139 N. C. 283, 51 S. E. 932 (1905). Condemnation for a cartway, on the other hand, is justified upon the ground that cartways are regarded as quasi-public roads intended to be publicly used to some extent, although they are laid out on the application of particular individuals, paid for by them, and designed for their special accommodation. *Waldroup v. Ferguson*, 213 N. C. 198, 195 S. E. 515 (1938).

⁵⁹ *Yadkin County v. High Point*, 217 N. C. 462, 8 S. E. 2d 470 (1940).

⁶⁰ *Virginia & C. So. R. R. v. Seaboard Air Line R. R.*, 161 N. C. 531, 78 S. E. 68 (1913).

⁶¹ *Sechriest v. Thomasville*, 202 N. C. 108, 162 S. E. 212 (1932).

⁶² *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 188 N. C. 128, 123 S. E. 312, *writ of error dismissed*, 267 U. S. 586 (1924).

⁶³ *Hildebrand v. Southern Bell Tel. and Tel. Co.*, 219 N. C. 402, 14 S. E. 2d 252 (1941).

⁶⁴ *Query v. Postal Telegraph-Cable Co.*, 178 N. C. 639, 101 S. E. 390 (1919).

⁶⁵ *Turner v. North Carolina Pub. Serv. Corp.*, 174 N. C. 522, 93 S. E. 998 (1917).

⁶⁶ 111 N. C. 439, 16 S. E. 402 (1892). *Cf. Charlotte Park and Recreation Comm'n v. Barringer*, 242 N. C. 311, 88 S. E. 2d 114 (1954), *cert. denied* 350 U. S. 983 (1956), noted in Note, 33 N. C. L. Rev. 482 (1955).

Right of party to object to condemnation:

It has been held that any taxpayer subject to general tax assessment for the cost of the taking may object to the condemnor's appropriating property for an improper or private use.⁶⁷ But the right to object is much clearer when asserted by one whose property will be directly affected by the condemnation. The taking may be said to be for a private use when the substantial benefit is for a private individual and the benefit to the condemnor is only incidental and prospective,⁶⁸ and it hardly needs to be said that only with the consent of the owner can property be taken for a private use.⁶⁹ But the fact that the condemnor is authorized or allegedly intends to engage in private as well as public business is no objection to condemnation.⁷⁰ The objector must wait until the property is actually used for private purposes before he can maintain the action of quo warranto to compel cessation of the private or improper use.⁷¹ The owner cannot usually enjoin the taking of his property by a municipality even if the purpose is to create what would be a nuisance, which could be enjoined if committed by a private individual.⁷² An injunction pendente lite could probably be secured by the owner, however, where the taker flatly denies the owner's application for compensation.⁷³ In addition to one's right to resist condemnation where such is for an improper use is his right to resist condemnation where the condemnor has acted arbitrarily and capriciously. However, unless the action of the condemnor is so unreasonable, arbitrary or unjust, as to amount to an oppressive and manifest abuse of discretion, the courts

⁶⁷ *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394 (1899). *But cf.* *Shaw v. Liggett & Myers Tobacco Co.*, 226 N. C. 477, 38 S. E. 2d 313 (1946); *Peters v. Pasquotank Highway Comm'n*, 184 N. C. 30, 113 S. E. 567 (1922).

⁶⁸ *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394 (1899).

⁶⁹ *Winchester v. Byers*, 196 N. C. 385, 135 S. E. 774 (1928).

⁷⁰ *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N. C. 314, 78 S. E. 297 (1913).

⁷¹ *Ibid.*

⁷² *Rhyne v. Flint Mfg. Co.*, 182 N. C. 489, 109 S. E. 376 (1921); *Rhodes v. City of Durham*, 165 N. C. 679, 81 S. E. 938 (1914). See *Town of Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543 (1922), where it was held that since the cemetery for which the town proposed to take the property would create a nuisance this amounted to a condemnation of adjacent property rights; injunction against the town was granted because the town had no power to condemn residential property. Later, the court in *Raleigh v. Edwards*, 235 N. C. 671, 71 S. E. 2d 396 (1952), distinguished this case and held that the landowner intervening in the condemnation proceedings could not prevent or collect damages for the nearby erection of an elevated water tank on the ground that it would constitute a nuisance. This was said to be a premature action since the tank had not yet been erected, a water tank not being a nuisance per se. Damages were held proper, though, because of the city's condemnation of negative easements or restrictive covenants. In *McKinney v. High Point*, 237 N. C. 66, 74 S. E. 2d 440 (1953), the elevated water tank had already been erected and was painted a bright silver which reflected the sun's rays, causing blinding glare. The landowner recovered on the ground that this cheapening of his property was a taking of his land without just compensation, though the court refused to hold the tank might constitute a nuisance.

⁷³ *Luther v. Commissioners of Buncombe County*, 164 N. C. 241, 246, 80 S. E. 386, 388 (1913) (dictum).

will not interfere.⁷⁴ Even an allegation that the condemnor's charter was a fraud will not be considered.⁷⁵

The measure of compensation:

The measure of compensation has been stated in a number of ways. It is said to be the just equivalent for the property taken;⁷⁶ it is also defined as the sum which probably would be arrived at as a result of fair negotiations by an owner willing to sell and a purchaser willing to buy after due consideration of all elements reasonably affecting value;⁷⁷ again, the measure is called the balance struck between the damages and benefits conferred.⁷⁸ Perhaps one of the most familiar rules grows out of the situation where the condemnor takes only an easement over a small part of a total tract; here the measure of damages is defined often as the difference, caused by the taking, in the value of the land before and after the taking.⁷⁹ The underlying idea seems to be that the owner is entitled to be put in as good a position pecuniarily as if the property had not been taken. Applying this rule, the owner is entitled to be paid only for the value of the property to him, and not for its value to the condemnor.⁸⁰ Generally, however, all the capabilities of the property and all of the uses to which it may be applied or for which it is adapted may be considered insofar as they affect its value in the market.⁸¹

The value of the property is awarded only as of the time when the condemnation proceeding was begun; no prior or subsequent fluctuation in value can be considered.⁸² The price that the owner was offered or that he actually paid for the property at some remote time prior to condemnation is permissible only as impeachment testimony.⁸³ The grantee of the owner is not allowed to sue for damages done to the land

⁷⁴ *In re: Housing Authority Project N. C.-16-2*, 235 N. C. 463, 70 S. E. 2d 500 (1952). *Lee v. Town of Waynesville*, 184 N. C. 565, 115 S. E. 51 (1922).

⁷⁵ *Holly Shelter R. R. v. Newton*, 133 N. C. 132, 45 S. E. 549 (1903); see *Peters v. Pasquotank Highway Comm'n*, 184 N. C. 30, 113 S. E. 567 (1922).

⁷⁶ *North Carolina State Highway and Pub. Works Comm'n, v. Black*, 239 N. C. 198, 79 S. E. 2d 778 (1954); *State v. Suncrest Lumber Co.*, 199 N. C. 199, 154 S. E. 72 (1930).

⁷⁷ *United States ex rel. and For Use of TVA v. Powelson*, 118 F. 2d 79 (4th Cir. 1941).

⁷⁸ *Elks v. Commissioners*, 179 N. C. 241, 102 S. E. 414 (1920); *Southport, W. & D. R. R. v. Owners of The Platt Land*, 133 N. C. 266, 45 S. E. 589 (1903).

⁷⁹ *Ibid.*; *Lanier v. Greenville*, 174 N. C. 311, 93 S. E. 850 (1911); *Lambeth v. Southern Power Co.*, 152 N. C. 371, 67 S. E. 921 (1910).

⁸⁰ *Nantahala Power & Light Co. v. Moss.*, 220 N. C. 200, 17 S. E. 2d 10 (1941).

⁸¹ *Ibid.*

⁸² *Town of Ayden v. Lancaster*, 197 N. C. 556, 150 S. E. 40 (1929); *Western Carolina Power Co. v. Hayes*, 193 N. C. 104, 136 S. E. 353 (1927). *But see State Highway & Pub. Works Comm'n v. Hartley*, 218 N. C. 438, 11 S. E. 314 (1940).

⁸³ *Palmer v. North Carolina State Highway Comm'n*, 195 N. C. 1, 141 S. E. 338 (1927) (18 years); *Lloyd v. Town of Venable*, 168 N. C. 531, 84 S. E. 855 (1915).

before he acquired title,⁸⁴ nor for damages to crops and use and occupation of the land—all this being considered "fruit fallen."⁸⁵ However, the grantee can recover for fresh injuries.⁸⁶

The only damages contemplated in the original condemnation proceedings are those that necessarily arise in the proper construction of the work. Nuisance or negligence is not contemplated and the owner does not have the right to collect damages for such torts in the original grant of compensation. Instead, the owner must bring a separate action to recover for work negligently done or which resulted in a nuisance.⁸⁷

When the condemnation causes mere inconvenience to the owner in the use of his property, this alone is no basis for compensation unless there is also an actual impairment of the owner's ability to use the property in a reasonable manner.⁸⁸ Also, loss of profits or injury to an established business is not an element of damages unless provided by statute, because business as such is not "property" in the eminent domain constitutional context.⁸⁹

The owner is not restricted to compensation for the value of the property physically brought under the taker's control, but may recover damages for intangible injuries as well. Examples of this have been recovery for increased dangers to person and property plus inconvenience and annoyance not suffered in common with others;⁹⁰ jarring, smoke, noise, dangers of fire and cinders;⁹¹ additional fencing made necessary;⁹² actual damages to growing crops outside the right of way;⁹³ loss of church congregation;⁹⁴ depreciation in value of property due to poles and trolley wires;⁹⁵ land made unfit for dairying by sewage disposal plant;⁹⁶ and depreciation in value of lands not taken.⁹⁷ On the other hand, the condemnor may reduce the amount of recovery by showing such things

⁸⁴ *Phillips v. Postal Telegraph-Cable Co.*, 130 N. C. 513, 41 S. E. 1022 (1902); see *Beal v. Railroad Co.*, 136 N. C. 298, 48 S. E. 674 (1904).

⁸⁵ *Liverman v. Roanoke & T. R. R. R.*, 114 N. C. 692, 19 S. E. 64 (1894).

⁸⁶ *Phillips v. Postal Telegraph-Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 1026 (1902) (dictum).

⁸⁷ *Spencer v. Willis*, 179 N. C. 175, 102 S. E. 275 (1920); see *Moses v. Town of Morganton*, 195 N. C. 92, 141 S. E. 484 (1928); *Ingram v. City of Hickory*, 191 N. C. 48, 131 S. E. 270 (1926).

⁸⁸ *Elks v. Commissioners*, 179 N. C. 241, 102 S. E. 414 (1920) (new road not as convenient as old road which is still open).

⁸⁹ *Pemberton v. Greensboro*, 208 N. C. 466, 181 S. E. 258 (1935); *State v. Suncrest Lumber Co.*, 199 N. C. 199, 154 S. E. 72 (1930).

⁹⁰ *Raleigh, C. & So. Ry. v. Mecklenburg Mfg. Co.*, 169 N. C. 156, 85 S. E. 390 (1915).

⁹¹ *Carolina & Y. R. R. v. Armfield*, 167 N. C. 464, 83 S. E. 809 (1914).

⁹² *Raleigh & A. A. L. R. R. v. Wicker*, 74 N. C. 220 (1876).

⁹³ *Haislip v. Wilmington & W. R. R.*, 102 N. C. 376, 8 S. E. 926 (1899); cf. *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572 (1903).

⁹⁴ *Durham & No. R. R. v. Trustees of Bullock Church*, 104 N. C. 525, 10 S. E. 761 (1889).

⁹⁵ *Wadsworth Land Co. v. Charlotte Elec. Co.*, 170 N. C. 674, 88 S. E. 439 (1915).

⁹⁶ *Pemberton v. Greensboro*, 208 N. C. 466, 181 S. E. 258 (1935).

⁹⁷ *Western Carolina Power Co. v. Hayes*, 193 N. C. 104, 136 S. E. 353 (1927).

as that the land is already subject to an easement⁹⁸ or that the claimant has only a life estate.⁹⁹ Also considered is the uses and purposes to which the property is reasonably adapted and might with reasonable probability be applied,¹⁰⁰ such as the eligibility of land for factory sites.¹⁰¹ The rental value of a building taken, the location and surroundings of land, and any other factor which would normally affect the value of the property may be considered.¹⁰²

Right of condemnor to offset benefits to realty:

One thing of great potential value to a condemnor is the right to offset benefits, both special and general. This entails offsetting any increase in the value of the owner's adjacent realty or of any estate remaining in the owner, caused by the condemnation, against the price due for the land taken. Benefits have to result directly to the property from the taking, but special benefits, unlike general ones, are not shared in common with the whole vicinity.¹⁰³ The law as to offset, though, has been subject to vacillation in North Carolina. These changes are explainable by virtue of the fact that granting or withholding this right of offset rests in the sound discretion of the legislature.¹⁰⁴ Prior to 1872 railroads could offset only special benefits.¹⁰⁵ This was changed in 1871 when the legislature provided that no benefits could be offset by railroads; but in 1891 the former principle was restored and special benefits could be offset once more.¹⁰⁶ In 1923 the General Assembly provided that municipalities could offset both general and special benefits.¹⁰⁷ This same rule has applied to the North Carolina State Highway and Public Works Commission since 1935.¹⁰⁸ Thus, the charter or the statutes applicable to the condemnor should always be consulted to determine if special or perhaps even general benefits can be offset. G. S. § 40-18 seems to indicate, though, that today offset of special benefits is allowed in the case of the usual condemnor. The right of municipalities and of the Highway Commission to offset all benefits appears to be the result of

⁹⁸ *Brown v. W. T. Weaver Power Co.*, 140 N. C. 333, 52 S. E. 954 (1903).

⁹⁹ *Miller v. Asheville*, 112 N. C. 769, 16 S. E. 765 (1893).

¹⁰⁰ *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 186 N. C. 179, 119 S. E. 213 (1923).

¹⁰¹ *Teeter v. Postal Tel. Co.*, 172 N. C. 783, 90 S. E. 941 (1916). See Note, 34 N. C. L. REV. 545 (1956) for a discussion on the right to include the special adaptability of the property for a dam site as an element of damages.

¹⁰² *Railroad v. Land Co.*, 137 N. C. 330, 49 S. E. 350 (1904).

¹⁰³ *Lanier v. Greenville*, 174 N. C. 311, 93 S. E. 850 (1911).

¹⁰⁴ *Goode v. Asheville*, 193 N. C. 134, 136 S. E. 340 (1927); *Elks v. Commissioners*, 179 N. C. 241, 102 S. E. 414 (1920); *Commissioners v. Johnston*, 71 N. C. 398 (1874); *Freedle v. North Carolina R. R.*, 49 N. C. 89 (1856).

¹⁰⁵ *Southport, W. & D. R. R. v. Owners of The Platt Land*, 133 N. C. 266, 45 S. E. 589 (1903); *Freedle v. North Carolina R. R.*, 49 N. C. 89 (1856).

¹⁰⁶ *Southport, W. & D. R. R. v. Owners of The Platt Land*, *supra* note 105.

¹⁰⁷ N. C. GEN. STAT. § 160-210 (1952).

¹⁰⁸ N. C. GEN. STAT. § 136-19 (1952 & Supp. 1955); see *Bailey v. State Highway and Pub. Works Comm'n*, 214 N. C. 278, 199 S. E. 25 (1938).

a legislative policy favoring purely public agencies¹⁰⁹ It should be noted, however, that in no event may the special or general benefits exceed the damages to the owner, for if this could happen the owner might be held liable to pay the condemnor for taking his land.¹¹⁰

Landowner's right to be paid for the "full fee":

It is not what the condemnor actually does, but what it acquires the right to do that determines the quantum of damages.¹¹¹ Therefore, since the condemnor acquiring a perpetual easement acquires the right to occupy and use the entire surface of the land for all time to the exclusion of the landowner, for all practical purposes the bare fee is of no value and the damages should be the same as if the fee were acquired. The possibility of abandonment by the taker is so remote and improbable that it is not allowed to be taken into consideration in determining the value of the easement.¹¹² However, if the parties stipulate that the owner may recover for any additional burdens placed on the land, an instruction that the perpetual easement amounts to a fee for all practical purposes is prejudicial error.¹¹³ Generally, a person is entitled to the damages in proportion to the period for which he suffers the encumbrance, though special circumstances may alter the case.¹¹⁴ Contingent remaindermen have to wait until the termination of the prior estate before payment is made, and the property, although converted into personalty, is treated as realty upon distribution.¹¹⁵ After payment of damages to the life tenant, the court may direct the clerk to invest the balance and distribute it to the contingent remaindermen only at the end of the life estate.¹¹⁶

Owner's right to interest:

The owner will get interest from the time of the condemnation judgment except against the state or one of its agencies.¹¹⁷ On trial de novo in the superior court from the award it is error to give interest from the

¹⁰⁹ *Elks v. Commissioners*, 179 N. C. 241, 245, 102 S. E. 414, 416 (1920). Here Chief Justice Clark said: "The distinction seems to be that where the improvement is for a private emolument, as a railroad or water power, or the like, being only a quasi-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but where the property is taken solely for a public purpose, the public should be called upon to pay only the actual damages, after deducting all benefits, either special or general."

¹¹⁰ *Goode v. Asheville*, 193 N. C. 134, 136 S. E. 340 (1927).

¹¹¹ *Carolina Cent. Gas Co. v. Hyder*, 241 N. C. 639, 86 S. E. 2d 458 (1955).

¹¹² *Ibid.*; *North Carolina State Highway and Pub. Works Comm'n v. Black*, 239 N. C. 198, 79 S. E. 2d 778 (1953).

¹¹³ *Carolina Power and Light Co. v. Clark*, 243 N. C. 577, 91 S. E. 2d 569 (1956).

¹¹⁴ See *Joyner v. Conyers*, 59 N. C. 78, 82-83 (1860).

¹¹⁵ *Miller v. Asheville*, 112 N. C. 769, 16 S. E. 765 (1893).

¹¹⁶ *Ibid.*

¹¹⁷ N. C. GEN. STAT. § 24-5 (1953), *Yancey v. North Carolina State Highway and Pub. Works Comm'n*, 222 N. C. 106, 22 S. E. 2d 256 (1942).

date of the taking or from the date of the award below in addition to the jury's verdict of the value of the property; it is presumed that a jury, properly instructed, has taken the interest factor into account in fixing value.¹¹⁸ The Federal rule, however, is that the Fifth Amendment, applicable only to the United States, requires interest from the date of the taking.¹¹⁹

Informal condemnation of realty by award of permanent damages:

Prior to *Ridley v. Seaboard & Roanoke R. R.*¹²⁰ the ordinary trespass action for the wrongful taking of or entry onto one's real property was not available to the owner where the taker had condemnation powers. The owner had to have his damages assessed according to the taker's charter or general statutes.¹²¹ But the *Ridley* case espoused the idea of "permanent damages," giving in effect an informal condemnation. The idea is that where one having the right of eminent domain, or its licensee¹²² or appointee,¹²³ enters on or takes land without resorting to condemnation, either party¹²⁴ may demand that permanent damages be awarded. Upon suit being commenced by the owner for permanent damages, this ends the continuing trespass, and upon payment of the damages assessed an easement passes to the taker.¹²⁵ This informal manner of condemnation is equivalent to formal condemnation,¹²⁶ and such a taker cannot be ousted by ejectment.¹²⁷ The fact that a suit for trespass may be barred after three years does not prevent a suit for permanent damages¹²⁸ because to recover such damages the owner must show a continuing trespass rather than single acts of trespass.¹²⁹ The conditions obviously must be existing when the action is brought.¹³⁰ The owner is not required to sue for permanent damages in the superior court when the entry is wrongful, for the owner has the option to sue for permanent damages or petition the clerk for assessment of damages.¹³¹ His right to sue for permanent damages exists only against entities having the power of condemnation, which means that the owner may not of right have permanent damages assessed against a private corporation for the maintenance of a nuisance which the owner could have en-

¹¹⁸ *City of Durham v. Davis*, 171 N. C. 305, 88 S. E. 433 (1916).

¹¹⁹ *Stubbs v. United States*, 21 F. Supp. 1007 (M. D. N. C. 1938).

¹²⁰ 118 N. C. 996, 24 S. E. 730 (1896).

¹²¹ *Holloway v. University R. R.*, 85 N. C. 452 (1881).

¹²² *White v. Northwestern N. C. R. R.*, 113 N. C. 610, 18 S. E. 330 (1893).

¹²³ *Brown v. Electric Co.*, 138 N. C. 533, 51 S. E. 62 (1905).

¹²⁴ *Rhodes v. City of Durham*, 165 N. C. 679, 81 S. E. 938 (1914).

¹²⁵ *Mason v. Durham County*, 175 N. C. 638, 96 S. E. 41 (1918).

¹²⁶ *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474 (1900).

¹²⁷ *Porter v. Aberdeen & R. F. R. R.*, 148 N. C. 563, 62 S. E. 741 (1908).

¹²⁸ *Love v. Postal Telegraph-Cable Co.*, 221 N. C. 469, 20 S. E. 2d 337 (1942).

¹²⁹ *Clinard v. Town of Kernersville*, 215 N. C. 745, 3 S. E. 2d 267 (1939).

¹³⁰ *Ingram v. City of Hickory*, 191 N. C. 48, 131 S. E. 270 (1926).

¹³¹ *McMahan v. Black Mountain Ry.*, 170 N. C. 456, 87 S. E. 237 (1915).

joined.¹³² The early cases on the subject held that the measure of damages in the permanent damages action included past, present and prospective damages,¹³³ but a more recent case appears to allow only the value of the land at the time the action is brought.¹³⁴ The *Ridley* case applied the doctrine to railroads, but it has since been applied to water companies,¹³⁵ telegraph companies,¹³⁶ canals,¹³⁷ municipalities,¹³⁸ and nuisance created by a municipality's discharge of sewage.¹³⁹ The principle now seems broad enough to cover any taker with the power of eminent domain.

Once the owner begins the permanent damages suit he may recover although he conveys to a third party during the pendency of the action. The theory which allows this is that when suit is begun the owner terminates the continuing trespass by indicating his consent to grant an easement upon payment of damages.¹⁴⁰ However, if the owner does not bring suit during the period of his ownership the right to sue for permanent damages passes to the grantee, because the continuing trespass has not in such a case been terminated.¹⁴¹ Where the grantor is granted permanent damages, the grantee is estopped from denying that an easement passed to the taker.¹⁴²

Nature of the proceedings:

After the prerequisite offer to buy has been made the taker begins the condemnation with the institution of a special proceeding before the clerk of the superior court.¹⁴³ The general procedure is outlined in Chapter 40 of the General Statutes.¹⁴⁴ However, some condemnors may have even the proper procedure outlined in their charters or in statutes specially relating to them.¹⁴⁵

Although in the usual condemnation proceeding the clerk acts as a judicial officer, an instance where he acts in an administrative capacity is where condemnation is for school purposes.¹⁴⁶ If the owner cannot show cause why the taker's petition for appointment of commissioners of appraisal should not be granted, the clerk orders the appointment of three

¹³² *Langley v. Staley Hosiery Mills Co.*, 194 N. C. 644, 140 S. E. 440 (1927).

¹³³ *Porter v. Aberdeen & R. F. R. R.*, 148 N. C. 563, 62 S. E. 741 (1908).

¹³⁴ *Clinard v. Town of Kernersville*, 215 N. C. 745, 3 S. E. 2d 267 (1939).

¹³⁵ *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474 (1900).

¹³⁶ *Phillips v. Wilmington & W. R. R.*, 130 N. C. 582, 41 S. E. 805 (1902).

¹³⁷ *Mullen v. Lake Drummond Canal & Water Co.*, 130 N. C. 496, 41 S. E. 1027 (1902).

¹³⁸ *Harper v. Town of Lenoir*, 152 N. C. 723, 68 S. E. 228 (1910).

¹³⁹ *Rhodes v. City of Durham*, 165 N. C. 679, 81 S. E. 938 (1914).

¹⁴⁰ *Caveness v. Charlotte, R. & So. R. R.*, 172 N. C. 305, 90 S. E. 244 (1916).

¹⁴¹ *Ibid*

¹⁴² *Bruton v. Carolina Power & Light Co.*, 217 N. C. 1, 6 S. E. 2d 822 (1939).

¹⁴³ *Johnson City Ry. v. South & W. R. R.*, 148 N. C. 59, 61 S. E. 683 (1908).

¹⁴⁴ N. C. GEN. STAT. §§ 40-11 through -29 (1950 and Supp. 1955).

¹⁴⁵ See *Norfolk & So. R. R. v. Warren*, 92 N. C. 620 (1885).

¹⁴⁶ N. C. GEN. STAT. § 115-125 (Supp. 1955), *Board of Education v. Allen*, 243 N. C. 520, 91 S. E. 2d 180 (1956).

disinterested freeholders to make the appraisal.¹⁴⁷ Since the assessment of the commissioners is not a jury verdict, a majority vote is sufficient.¹⁴⁸ And the fact that the commissioners are citizens of the town in which the land to be condemned is located, and therefore subject to additional taxes to pay for the land condemned, is no ground for disqualifying them; their interest is considered too remote.¹⁴⁹

Not until the commissioners file their report of appraisal can an appeal to the superior court be had, for prior to this time there is no final judgment from which to appeal.¹⁵⁰ Although proceedings before the clerk may be administrative in some cases, the proceedings in the superior court are always judicial in nature.¹⁵¹ Appeal can be made only to the court in term, and not to the judge at chambers.¹⁵² Here a trial *de novo* is held as though no appraisal had been made, unless the superior court judge in his discretion remands the proceedings to the clerk for a new appraisal.¹⁵³ The tactic of appeal cannot be used as a device for delay. The condemnor may take possession despite the appeal.¹⁵⁴ Since the condemnor must make adequate provision for compensation such as the posting of a bond as a condition of the taking, the owner is protected.¹⁵⁵ Because the statutory remedy is considered exclusive, the matter of compensation is settled if there is no appeal, and the owner cannot later maintain an action for damages.¹⁵⁶ On an appeal to the superior court the usual function of the jury is to pass on the issue of compensation,¹⁵⁷ but it may properly decide such questions as whether condemnation would amount to a nuisance¹⁵⁸ or whether lands already condemned are being used so as to exempt them from further condemnation.¹⁵⁹

Condemnation seems to be an *in rem* proceeding, and payment of the award into court discharges the taker's obligation whether or not the

¹⁴⁷ N. C. GEN. STAT. § 40-16 (1950).

¹⁴⁸ *Austin v. Helms*, 65 N. C. 560 (1871).

¹⁴⁹ *Johnson v. Rankin*, 70 N. C. 550 (1874).

¹⁵⁰ *In re Baker*, 187 N. C. 257, 121 S. E. 455 (1924).

¹⁵¹ N. C. GEN. STAT. § 115-125 (Supp. 1955), *Board of Education v. Allen*, 243 N. C. 520, 91 S. E. 2d 180 (1956).

¹⁵² *Cape Fear & No. R. R. v. Stewart*, 132 N. C. 248, 43 S. E. 638 (1903).

¹⁵³ *Carolina Power and Light Co. v. Reeves*, 198 N. C. 404, 151 S. E. 87 (1930); *Hanes v. North Carolina R. R.*, 109 N. C. 490, 13 S. E. 896 (1891).

¹⁵⁴ *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905).

¹⁵⁵ *State v. Wells*, 142 N. C. 590, 55 S. E. 210 (1906); *Postal Telegraph-Cable Co. v. Southern Ry.*, 89 Fed. 190 (C. C. W. D. N. C. 1898) (telegraph company was prohibited from entering until payment of amount assessed into court); *Carolina Cent. R. R. v. McCaskill*, 94 N. C. 746 (1886); *Raleigh & G. R. R. v. Davis*, 19 N. C. 451 (1837).

¹⁵⁶ *Harwood v. Concord*, 201 N. C. 781, 161 S. E. 534 (1931); *Carolina Cent. R. R. v. McCaskill*, 94 N. C. 746 (1886).

¹⁵⁷ *Board of Education v. Allen*, 243 N. C. 520, 91 S. E. 2d 180 (1956); *Madison County Ry. v. Gahagan*, 161 N. C. 190, 76 S. E. 696 (1912).

¹⁵⁸ *Town of Selma v. Noble*, 183 N. C. 322, 111 S. E. 543 (1922).

¹⁵⁹ *Blue Ridge Interurban R. R. v. Oates*, 164 N. C. 167, 80 S. E. 398 (1913).

true owner of the land is known or ever receives the money.¹⁶⁰ By the same token if the condemnor pays the award into court voluntarily and without objection, labeling it as payment rather than as a deposit, the owner may accept the "offer" and settle the question of compensation.¹⁶¹

Generally, as to the assessment of damages, the owner is not entitled to prior notice, but proper notice and an opportunity to be heard must be given to enable the owner to attack the fairness of the assessment.¹⁶² The procedure for giving this notice is usually found in the statutory or charter provisions applicable to the condemnor, but the taker may be able to proceed by giving actual notice to the owner where there is no express provision.¹⁶³ Initial service of notice upon parties may be by publication if they cannot be found after the exercise of due diligence.¹⁶⁴ Once a proceeding has been commenced, because a motion made before the clerk is in the same category as one made out of term in the superior court, the clerk cannot make a determination on exceptions of a party until all other parties are given notice and opportunity to be heard.¹⁶⁵

The title and possessory rights in connection with condemnation:

Generally, the condemnor may take possession of the land before compensation has been ascertained or paid.¹⁶⁶ But since title does not vest in the condemnor until final confirmation and payment of the amount appraised, the owner may effectively convey or the condemnor may vacate or take a nonsuit any time prior to confirmation and payment;¹⁶⁷ and, the legislature can authorize the condemnor to decline taking the land even after final judgment.¹⁶⁸ Although the condemnor does not acquire the title until payment of the award of compensation, it is deemed owner from and its title, once perfected, relates back to the time of the commencement of the proceedings.¹⁶⁹ If the title of the purported owner is denied by the condemnor, the one claiming to own the land has the

¹⁶⁰ See N. C. GEN. STAT. §§ 40-14, -19, -22 to -24 (1950 and Supp. 1955); *United States v. Burnette*, 103 F. Supp. 645 (W. D. N. C. 1952).

¹⁶¹ *North Carolina State Highway and Pub. Works Comm'n v. Brann*, 243 N. C. 758, 92 S. E. 2d 146 (1956); *North Carolina State Highway and Pub. Works Comm'n v. Pardington*, 242 N. C. 482, 88 S. E. 2d 102 (1955).

¹⁶² *Kinston v. Loftin*, 149 N. C. 255, 62 S. E. 1067 (1908); *Dickson v. Perkins*, 172 N. C. 359, 90 S. E. 289 (1916); *Luther v. Commissioners*, 164 N. C. 241, 80 S. E. 386 (1913); *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905). As to cartways being condemned, notice and opportunity to be heard must be given to the owner as a prerequisite to the taking, for this is primarily a contest between individuals. *Waldroup v. Ferguson*, 213 N. C. 198, 195 S. E. 615 (1935).

¹⁶³ *Luther v. Commissioners*, 164 N. C. 241, 80 S. E. 386 (1913).

¹⁶⁴ *Brown v. Doby*, 242 N. C. 462, 8 S. E. 2d 921 (1955).

¹⁶⁵ *Collins v. North Carolina State Highway and Pub. Works Comm'n*, 237 N. C. 277, 74 S. E. 2d 709 (1953).

¹⁶⁶ *State v. Lyle*, 100 N. C. 497, 6 S. E. 379 (1888); see note 155 *supra*.

¹⁶⁷ *Nantahala Power and Light Co. v. Whiting Mfg. Co.*, 209 N. C. 560, 184 S. E. 48 (1936); *Caviness v. Charlotte, R. & So. RR.*, 172 N. C. 305, 90 S. E. 244 (1916); *Abernathy v. South & W. Ry.*, 150 N. C. 97, 63 S. E. 180 (1908).

¹⁶⁸ *State v. Floyd*, 204 N. C. 291, 168 S. E. 222 (1933).

¹⁶⁹ *Ibid.*

burden of proving his ownership,¹⁷⁰ and the condemnor may show that the title is in some third person.¹⁷¹

Statute of limitations:

Property may be acquired by the state or condemnor by user or adverse possession for the requisite period, in addition to grant, dedication, or condemnation.¹⁷² If the charter of the condemnor provides that all claims for compensation must be made within a certain time, this is a positive statute of limitations and bars all claims of parties *sui juris* not made within that time.¹⁷³ But if the statute or charter is silent as to when the claim for compensation must be brought, the owner may sue any time before the period for adverse possession or prescription has expired.¹⁷⁴

GERALD CORBETT PARKER

Insurance—Automobile Liability Policies—Proportionate Distribution for Multiple Claimants

Multiple claims arising under an automobile liability insurance policy, when the insured motorist is insolvent and the proceeds of the insurance fund are insufficient to cover all claims, have created a situation in which some of the claimants find that instead of receiving compensation for their injuries, they will receive only a valueless judgment against the tortfeasor.

This situation is growing; one has only to look at the records to see that deaths and injuries on our highways are increasing; that judgments are larger, resulting in a corresponding increase in settlements. The coverage of insurance policies is relatively small in comparison to these increases.

To illustrate, suppose that A, the insolvent motorist, negligently col-

¹⁷⁰ *Fuller v. Elizabeth City*, 118 N. C. 25, 23 S. E. 922 (1896).

¹⁷¹ *Abernathy v. South & W. Ry.*, 150 N. C. 97, 63 S. E. 180 (1908). A trap was laid for the title searcher in *Norman Lumber Co. v. United States*, 223 F. 2d 868 (4th Cir. 1955), which held that the North Carolina statutes relating to recording and cross-indexing of judgments have no application to federal judgments of condemnation. This means that the title lawyer must inquire at the office of the Clerk of the United States District Court before his title is cleared. As to parties other than the United States, condemnation judgments must be recorded and cross-indexed in the office of the superior court clerk of the county in which the land is located, but judgments are recorded as special proceedings judgments and are exempt from the requirements as to registration of deeds. *Carolina Power & Light Co. v. Bowman*, 228 N. C. 319, 45 S. E. 2d 531 (1947). Nevertheless, such judgments must include a description of the land and the estate or interest secured by the condemnor. *Beal v. Durham & C. R. R.*, 136 N. C. 298, 48 S. E. 674 (1904).

¹⁷² *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344 (1915).

¹⁷³ *Carolina Cent. R. R. v. McCaskill*, 94 N. C. 746 (1886).

¹⁷⁴ *Carolina & N. Ry. v. Piedmont Wagon and Mfg. Co.*, 229 N. C. 695, 51 S. E. 2d 301 (1949); *Love v. Postal Telegraph-Cable Co.*, 221 N. C. 469, 20 S. E. 2d 337 (1942).